

## **IMPACT OF THE ATTORNEY GENERAL OPINION GA-0519 ON MEDICAL INFORMATION & HIPAA**

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Three questions need to be asked to understand the impact of the AG's opinion on medical information and HIPAA. This article will ask and answer those questions which may assist readers in understanding the impact of the AG's opinion on medical information and HIPAA. .

### **HOW DOES THE RECENT TEXAS ATTORNEY GENERAL OPINION (GA-0519) RELATE TO HIPAA?**

The simplest way to understand how this opinion relates to medical information about individuals is to understand that the Health Information Portability and Accountability Act or HIPAA Privacy Rule, protects against the illegal use and disclosure of individual medical records, which usually contain Social Security Numbers.

That's a clear example of how preventing the distribution of SSN's can affect the distribution of, or posting of medical records to the Internet by counties, cities, School districts, and private organizations across Texas and the nation.

However, there are other significant connections that must be made between this AG opinion that all governmental entities, officials, and private entities in the Texas must be aware of including potential criminal penalties for the illegal distribution of both SSN's and medical information.

### **IS MEDICAL INFORMATION CONSIDERED CONFIDENTIAL UNDER PIA, & DOES HIPAA APPLY TO TEXAS?**

The Attorney General's opinion, correctly states that Social Security Numbers are considered "confidential by law," thus not disclosable under the Texas Public Information Act, (or the PIA). This opinion was based on established law on the State and Federal levels, for example the opinion cited the "Federal Social Security Act," of 1990.

The Attorney General's Office based the opinion on well established and clear State and Federal statutes. In 2006, the State Court of Appeals in Austin ruled that "medical

information” is considered “*confidential under the PIA*” which places both SSN and medical information in the class of protected information. The Appellate Court clearly said that the HIPAA Privacy rule applies to the State of Texas, please see Abbott v. Texas Department of Mental Health and Mental Retardation.

This Appellate Court ruling creates a clear connection between this AG opinion covering SSN information, and medical information protected by HIPAA.

The Appellate Court in the Abbott case said: “for example, if the information is considered confidential by judicial decision, statute, or the constitution, then the information is not subject to disclosure under the "confidential" exception to disclosure found in the Public Information Act. See Tex. Gov't Code Ann. § 552.101; see also Tex. Occ.Code Ann. § 159.002 (West 2004) **(patient records and communications between patient and physician confidential)**”

Confidential information is mentioned in the AG’s opinion as the type of information that cannot be released by any County Official including County Clerks’ Offices. Thus, medical information qualifies as “confidential information” protected by the PIA like SSN’s.

The Attorney General’s Office also agreed with the Appellate Court that HIPAA applies to the State of Texas in this comment related to the case: ***“The Attorney General does not contest that HIPAA generally applies or the Department’s assertion that the Department is a "covered entity" subject to the requirements of HIPAA and the Privacy Rule.”*** The Court then went onto apply the HIPAA Privacy rule to a State level governmental entity.

Consequently, a clear legal connection has been made between the AG’s opinion on “confidential” information which includes both SSN and medical information and the ruling by the Court of Appeals. Both types of information, medical information and SSN information are considered “confidential” by state and federal law as well as by judicial interpretation.

The AG’s opinion covered the consequences on the State level for the disclosure of confidential information in this comment: “The distribution of confidential information under the PIA constitutes official misconduct and a criminal misdemeanor punishable by a fine of up to \$1,000, confinement in the county jail for up to six months, or both. See TEX. GOVT CODE ANN. 5 552.352 (Vernon 2004)”

This could involve the distribution of both SSN’s and medical information by counties, cities, other governmental and private entities in the State of Texas. In addition to explaining the consequences of violating the laws at the State level, the AG stated that there are Federal issues also involved with confidential information when they stated, *“Thus, when a Texas governmental body obtains or maintains a SSN pursuant to a provision of law and the provision of law was enacted on or after October 1, 1990, the SSN is confidential under the Social Security Act and excepted from public*

disclosure under section 552.101 of the PIA. See Tex. Att’y Gen. ORD-622 (1994) at 3, **6. And, under the Social Security Act, the disclosure of a SSN in violation of federal law is a felony.** See 42 U.S.C.A. 5 408(a) (8) (West. Supp. 2006).”

## **DOES HIPAA APPLY TO COUNTIES IN TEXAS, AND CAN THEY SELL COUNTY RECORDS INCLUDING MEDICAL INFORMATION IN THOSE RECORDS?**

According to both the Appellate Court in Austin and the Attorney General, HIPAA applies on a general basis and specifically to governmental entities. The Privacy rule also makes it clear that HIPAA applies to counties and a wide variety of governmental entities on the State and Federal levels.

A term used in referring to protected medical information in the Federal Statute is “*Individually Identifiable Health Information*”, which means medical information about individuals controlled by governmental or private entities that are subject to the HIPAA rules and regulations. Since HIPAA is a Federal “Civil Rights Statute”, most private and public organizations must follow the HIPAA Privacy and Security mandates when dealing with protected information. The penalty for “wrongfully disclosing” medical information under HIPAA is a federal felony.<sup>1</sup> Please see footnote number one directly below.

In sum, the laws governing the privacy of individual information, including HIPAA, are being enforced on the state and federal levels and can no longer be ignored by organizations impacted by these legal mandates.

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<sup>1</sup> The Federal penalty can be found in section 42 United States Code Annotated § 1320 – 6, which is entitled: “**Wrongful Disclosure of Individually Identifiable Health Information**”. The penalty for a person that knowingly violates HIPAA, by selling IIHI for profit is as follows: “(a) *Offense A person who knowingly and in violation of this part-- ... (3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b) of this section.*”

Subsection (b) covers the specific penalties, stating in relation to selling IIHI or medical information as follows: “...a person described in subsection (a) of this section shall-- ... **(3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than \$250,000, imprisoned not more than 10 years, or both.**”

